

EXHIBIT 9

FILED UNDER SEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES, et al., : Civil Action No.:
Plaintiffs, : 1:23-cv-108
versus : Tuesday, August 27, 2024
GOOGLE LLC, : Alexandria, Virginia
Defendant. : Pages 1-33

The above-entitled motions hearing was heard before the Honorable Leonie M. Brinkema, United States District Judge. This proceeding commenced at 10:04 a.m.

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25 COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 we have voluminous evidence that not only was that not
2 complied with, indeed, Google concedes that for the nine
3 employees who admitted to using chats, eight of them, eight
4 out of nine, failed to turn the toggle on to preserve the
5 chats. So there was not compliance with this purported
6 basis to preserve even chats that were otherwise going to be
7 automatically deleted.

8 And, in fact, the evidence shows that Google --
9 the employees were repeatedly deliberately moving
10 communications to off-the-record chats so that they wouldn't
11 be discovered. Indeed, we have one instance we've cited to
12 the Court involving one of the trial witnesses, Mr. Korula,
13 who was literally instructed by a Google attorney to turn
14 his history off when discussing substantive matters.

15 So this was essentially part of a three-prong
16 process that Google implemented, not all of which was made
17 clear to the United States, and certainly wasn't made clear
18 during the investigation or the early days of this case.

19 So the United States brought this motion at the
20 appropriate time, at the time for pretrial motions. This is
21 not a motion that seeks further discovery, it doesn't seek
22 enforcement of the specific discovery order, and it is a
23 motion designed to deal with how this evidence will be
24 treated at trial, and so it was appropriately brought, in
25 the United States' estimation, at the pretrial phase.

1 The Court will recall that up until May of this
2 year, this case was intended to proceed by jury trial, and
3 the United States was prepared to file a motion for jury
4 instructions for an adverse inference on these issues, but
5 prudentially wanted to gather evidence about exactly how
6 these missing chats were going to impact the trial of this
7 case. The United States anticipated the Court would have
8 questions about the specific and concrete prejudice that the
9 United States has suffered, and so the Court -- the United
10 States has waited until the exhibit lists were produced, the
11 witness lists were produced, so that we can put the scope of
12 this conduct into appropriate context.

13 So this was not a situation where any kind of
14 delay was tactical on the United States' part; it was a
15 prudential judgment we made to give the Court complete
16 context and the complete picture before raising this serious
17 motion.

18 THE COURT: Wait. Can you tell me, when do you
19 think the government first became aware of the Walker memo?

20 MS. WOOD: The Walker memo I believe was produced
21 during discovery. Whether it was produced during the
22 investigation or during the litigation, I can't say
23 specifically. But the Walker memo was not produced, you
24 know, in the first days of discovery.

25 THE COURT: Well, once it was produced, it clearly

1 would have put you on notice that there was this policy
2 about deleting most chats. In fact, in particular, that the
3 default was being set such that the chats were automatically
4 going to be deleted.

5 MS. WOOD: I believe that information first came
6 to light in the context of the proceeding in the Northern
7 District of California in January of 2023. And while that
8 predated the litigation here, what we didn't know was, A,
9 how it impacts our witnesses in particular; and B, and
10 perhaps more importantly, the difficulty and cumbersome
11 process that was required to convert history-on chats to
12 history -- or history-off chats to history-on chats.

13 That is a pivotal distinction in our mind, because
14 if it were a simple process of employees being able to, once
15 they're on a litigation hold, go into their system and for
16 all their chats from today for the next five years just
17 toggle history on, I think we would be in a very different
18 situation, Your Honor. And that we did not learn until much
19 later through the course of discovery.

20 And remember also that many of the chats that were
21 produced that we've cited as evidence here were produced
22 well after the original fact discovery cutoff, and some were
23 produced even more recently than that, as Google has
24 continued to comply with their discovery obligations by
25 producing documents later and later.

1 And so it is a question, if we had had full and
2 complete information at a different time, we would be in a
3 very different situation, although I still believe that in
4 that context it would still be prudential to bring the
5 motion at an appropriate pretrial phase, either in
6 connection with a motion for an adverse inference to be
7 charged to the jury or with respect to the Court. But the
8 case law is clear, that when the spoliation conduct is
9 serious, that outweighs any concern about purported
10 timeliness.

11 I'll also offer to Your Honor that Google has been
12 unable to articulate any form of prejudice or harm due to
13 the timing of this motion, and there is none. Because any
14 arguments they would have had back in October, November,
15 December about the timing, if the motion had been filed
16 then, could easily be made now. They have not lost any
17 arguments in the interim. We are not seeking a delay in the
18 trial, we are not seeking additional discovery, we are not
19 seeking to supplement the evidentiary record in any way.
20 What we are seeking is a trial-related relief, and that, we
21 believe, comports with the case law about the appropriate
22 timing for motions such as these, and we believe it was --
23 in our view, we were mindful of the Court's admonition to
24 focus on the merits, to proceed with the case accordingly,
25 and to give concrete examples and context for any alleged

1 prejudice. And so that is the reason why we determined it
2 to be most prudential to see what witnesses were on both
3 sides of the witness list, what exhibits were on the exhibit
4 list, and exactly how Google's conduct has threatened a fair
5 trial in this case.

6 THE COURT: All right. Thank you. All right,
7 Ms. Rhee.

8 MS. RHEE: Thank you, Your Honor.

9 THE COURT: There are a whole bunch of problems
10 with how Google approached the preservation of evidence in
11 this case. I mean, the Walker memo of course goes back to
12 before litigation was actually started, but there's
13 incredible smoking guns within that document. I mean,
14 there's a clear recognition, you know, "as you know, Google
15 continues to be in the midst of several significant legal
16 and regulatory matters, including government review of our
17 deal with Yahoo." And then it goes on. And then -- you
18 know, so it sets the setting for an argument that there was
19 definitely a very clever approach to try to hide relevant
20 information going back to 2008.

21 And then my concern from the record of this
22 case -- and I'm looking at Appendix B that was attached to
23 the government's motion -- which talks about the litigation
24 hold and the incredible delay in which various witnesses
25 were notified about that litigation hold. Because that has

1 a huge impact, given the fact that there was this automatic
2 deletion as to chat messages that just indicates that an
3 awful lot of evidence has likely been destroyed.

4 You need to address those issues.

5 MS. RHEE: Thank you, Your Honor.

6 So we think that the Court is right to focus on
7 timeliness here.

8 With respect to the Walker memo, the date of that
9 is 2008, as the Court rightly noted. That was well before
10 the --

11 THE COURT: Well, it's before this case was filed,
12 but it recognizes that even back then, Google was being
13 looked at by regulators. All right.

14 And so, you know, is it wise to tell your people,
15 hey, the government's going to be looking at us, we want to
16 make sure that sensitive information is not kept, because if
17 it's kept, then we might have -- in fact, it says that in
18 the memo, our discovery obligations, we have to turn it
19 over.

20 So, you know, it's not saying to them directly,
21 destroy any relevant evidence; it's sort of a wink and a
22 nod. But, I mean, it's clearly giving a message to
23 employees that there are different ways of communicating
24 this particular way through chats we can kind of control.

25 And corporation-wide, there was this default put

1 in, as I understand it. So if you were involved in a chat
2 and you're a Google employee, there was automatically a
3 default that that conversation would be destroyed within a
4 few hours unless the employee did something. So you put the
5 burden on the ordinary employee to decide whether or not
6 that particular chat needed to be preserved, and, even then,
7 the length of preservation, as I understand it, the max was,
8 what, 18 months.

9 And the other thing that's strange in this case --
10 and someone has to explain exactly how this would operate in
11 a chat conversation -- is that even if I, the Google
12 employee, took off the default and so now I wanted it
13 preserved, the recipient, the other member of that chat also
14 had to do something; right?

15 MS. RHEE: No, Your Honor. Any one of the
16 participants who had a history on would preserve that
17 particular conversation or thread.

18 THE COURT: Both sides of it?

19 MS. RHEE: Yes, both sides of it. Because it's
20 instantaneous, equivalent of text messaging. So unlike
21 emails, you're not going to have both sides of it. So with
22 respect to the way that it functioned, if one of the
23 participants had a history on, then it would be a history-on
24 conversation.

25 THE COURT: And so that the other -- what if the

1 other side hit history off, if there was another Google
2 employee?

3 MS. DUNN: Even if they had a history off, at
4 least for the custodian with the history on, that would be
5 preserved, and the entirety of that text exchange would be
6 preserved.

7 THE COURT: Right. Now, how do you respond to
8 Appendix B? And that is that the length of time between the
9 time that the litigation hold was requested and the time in
10 which the litigation hold was actually communicated to the
11 particular employee?

12 MS. RHEE: Yeah. I mean, I think there what you
13 can see in Google's filing and response, Your Honor, is a
14 corrected Appendix B, because upon review of all of the
15 underlying hold notices, what was properly reflected was not
16 always the earliest time hold notice that those recipients
17 actually got in connection with the topics of this
18 investigation.

19 And so, again, when you actually look at the
20 attachments to Google's reply to the government's motion,
21 the corrected dates of the very first-in-time hold notices
22 that were issued reflect that actually there wasn't an undue
23 delay on the company's part to issue the hold notices.

24 Of course, the government continues to contend
25 that those hold notices and the processes around them were

1 for the day.

2 MS. RHEE: Thank you.

3 (Proceedings adjourned at 10:44 a.m.)

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5 I certify that the foregoing is a true and accurate
6 transcription of my stenographic notes.

7 Stephanie Austin
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9 Stephanie M. Austin, RPR, CRR
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